U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-R-

DATE: FEB. 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a pastry chef, seeks classification as an individual of extraordinary ability in the arts. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, concluding that the Petitioner had not submitted the required evidence for eligibility.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not consider the documentation submitted and her decision did not explain the reasons for denying the petition. During the adjudication of the appeal, we issued the Petitioner a notice of intent to dismiss (NOID) due to discrepancies regarding her previous employment experience. The Petitioner responded to the NOID, providing supporting documentation to rebut the information discussed therein.

Upon *de novo* review, we will remand the matter to the Director for further proceedings consistent with the following.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth two options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate a one-time achievement (that is a major, internationally recognized award). Alternatively, he or she must provide documentation that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, memberships, and published material in certain media).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Petitioner is a pastry chef. As the record does not establish that she has received a major, internationally recognized award, she must satisfy at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The Director denied the petition, concluding that the Petitioner did not establish eligibility as an individual of extraordinary ability. On appeal, the Petitioner asserts that the Director did not provide sufficient reasoning for the denial even though the initial documentation submitted with the petition contained evidence pertaining to the following criteria: awards under 8 C.F.R. § 204.5(h)(3)(i), leading role under 8 C.F.R. § 204.5(h)(3)(viii), and salary under 8 C.F.R. § 204.5(h)(3)(ix).

The Petitioner bears the burden to establish eligibility for any benefit, and each request must be properly completed and filed with all initial evidence required by applicable regulations or other instructions. 8 C.F.R. § 103.2(b)(1). If the required initial evidence is submitted but does not establish eligibility, U.S. Citizenship and Immigration Services (USCIS) may deny the petition for ineligibility, request more evidence, or issue a notice of intent to deny and provide an opportunity to respond. 8 C.F.R. § 103.2(b)(8)(ii). Notably, the instructions for the Form I-140 specify that a petitioner seeking to establish extraordinary ability must include evidence of a one-time achievement

or three of the criteria set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x), plus evidence of coming to the United States to continue to work in his or her area of expertise.[1]

Where a visa petition is denied based on a deficiency of proof, and the Director did not provide notice of the deficiency and offer a reasonable opportunity to address it before the denial, and the appeal contains additional evidence addressing the deficiency, then in the ordinary course of events we will remand to allow the Director to consider and address the new material. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Accordingly, we will remand the matter to the Director to consider the evidence submitted with the petition and the additional evidence submitted on appeal and in response to the NOID.

As an additional matter, the Petitioner alleged that her employment as a chef at the [redacted] in [redacted] demonstrated her leading role for an organization with a distinguished reputation under 8 C.F.R § 204.5(h)(3)(viii). The record contained a letter from [redacted] identified as the general manager of this hotel, indicating that the Petitioner worked there as head chef in the pastry division from February 1, 1998, through December 31, 2002. However, in a recent overseas investigation, an officer contacted the manager of the [redacted] who informed the officer that the Petitioner was never employed there and that the hotel has never employed an individual named [redacted] as the general manager. We informed the Petitioner of this derogatory information in a NOID and provided an opportunity for her to rebut these claims.

In response, the Petitioner submitted documentation to support her claim that she did work as a chef for the [redacted] Accordingly, the Director should also consider the Petitioner's response to determine if it is sufficient to overcome the alleged misrepresentation.

III. CONCLUSION

For the foregoing reasons, we remand the matter to the Director to consider whether the Petitioner meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). If the Petitioner meets three of these criteria, the Director must consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of A-R-*, ID# 1614058 (AAO Feb. 19, 2019)

[1] *See* https://www.uscis.gov/i-140 under "Instructions for Form I-140."